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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

**IN RE DA VINCI SURGICAL ROBOT  
ANTITRUST LITIGATION,**

This Document Relates to:  
  
ALL ACTIONS.

Lead Case No. 3:21-cv-03825-AMO

**DEFENDANT'S MOTION FOR  
LEAVE TO FILE MOTION FOR  
RECONSIDERATION OR, IN THE  
ALTERNATIVE, FOR  
CERTIFICATION OF AN  
INTERLOCUTORY APPEAL**

Date: May 30, 2024  
Time: 2:00 p.m.  
Courtroom: 10

The Honorable Araceli Martínez-Olguín

**MOTION AND NOTICE OF MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant Intuitive Surgical, Inc. (“Intuitive”) hereby moves the Court, pursuant to Civil Local Rule 7-9, for leave to file the attached motion for reconsideration (Exhibit A) of portions of the Court’s March 31, 2024 Order Granting in Part and Denying in Part Hospital Plaintiffs’ Motion for Summary Adjudication (Dkt. 232, the “Order”).<sup>1</sup> Intuitive requests that the Court reconsider its rulings as to the interrelated issues of the definition of a U.S. market for EndoWrist repair and replacement, Intuitive’s power in such a market, and separate products. Intuitive respectfully submits that the Court’s rulings on these issues directly conflict with the Ninth Circuit’s decision in *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 681 (2024), and *cert. denied*, 144 S. Ct. 682 (2024), and that reconsideration is warranted under Civ. L.R. 7-9(b)(3) and/or the inherent authority of the Court to prevent clear error or manifest injustice.

In the alternative, PLEASE TAKE NOTICE that on May 30, 2024 at 2:00 p.m., or as soon thereafter as this matter may be heard before the Honorable Araceli Martínez-Olguín, District Judge in the United States District Court for the Northern District of California, at 450 Golden Gate Avenue, Courtroom 10, 19th Floor, San, Francisco, CA 94102, Intuitive will and hereby does move the Court for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on these controlling issues of law. To conserve judicial resources and avoid unnecessary duplication, Intuitive is presenting both motions together, with the request for § 1292(b) certification (for which leave to file is not required) made in the alternative, in the event that reconsideration is denied.

This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in support thereof, the proposed motion and

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<sup>1</sup> Pursuant to Civil L.R. 7-9(d), Intuitive does not at this time notice the motion addressed in this paragraph for hearing. Intuitive requests that the Court, in addition to granting leave to file its motion for reconsideration, set that motion for hearing on May 30, 2024, which is the date Intuitive is noticing for its motion in the alternative for certification under 28 U.S.C. § 1292(b).

1 accompanying memorandum of law provided in Exhibit A hereto, and such arguments and  
2 authorities as may be presented at or before the hearing.

3 **STATEMENT OF ISSUES TO BE DECIDED**

4 1. Whether the Court should grant leave for Intuitive to file the attached motion  
5 for reconsideration (Exhibit A) of those portions of the Court's Order granting summary  
6 judgment for the Hospital Plaintiffs (or "Plaintiffs") as to the existence and definition of a  
7 separate, single-brand aftermarket for EndoWrist repair and replacement and as to Intuitive's  
8 alleged monopoly power in such an aftermarket, Order at 14:9-11, 18:9-12, and 21:3-5, where  
9 Plaintiffs have not demonstrated that they meet the four requirements for establishing a single-  
10 brand aftermarket set forth in *Epic Games*, 67 F.4th at 977, and where the Court correctly  
11 concluded that there are genuine disputes of material fact precluding summary judgment as to the  
12 definition of the alleged primary market or "foremarket" (for surgical robots) and Intuitive's  
13 power in that alleged foremarket.

14 2. If the Court denies leave to seek reconsideration or declines to reconsider its  
15 Order, whether the Court should certify, pursuant to 28 U.S.C. § 1292(b), an interlocutory appeal  
16 as to the following question of law: Can a plaintiff be granted summary judgment on the  
17 existence and definition of a single-brand aftermarket, and a defendant's alleged monopoly  
18 power in such an aftermarket, without (a) satisfying the four requirements for establishing a  
19 single-brand aftermarket set forth in *Epic Games*, 67 F.4th at 977, or (b) establishing as a matter  
20 of undisputed fact that the defendant has monopoly power in a properly defined foremarket?

21 Because Intuitive is seeking certification of an interlocutory appeal in the  
22 alternative, and only in the event that the Court either denies leave to seek reconsideration or  
23 declines to reconsider its prior rulings, we briefly summarize the arguments for interlocutory  
24 appeal herein and—to avoid repetition and inefficiency—we include a more detailed discussion  
25 of those arguments, and how those points relate to the arguments for reconsideration, in the  
26 single, consolidated memorandum attached as Exhibit A.

**MEMORANDUM OF POINTS AND AUTHORITIES**

Intuitive recognizes that reconsideration is an exceptional remedy, and we do not bring this motion for leave lightly. But we respectfully submit that reconsideration is warranted here to prevent this case from proceeding on the basis of a critical legal error.

As summarized below, and discussed in more detail in the attached motion (Exhibit A), the Court’s holdings that there exists a separate, single-brand aftermarket for EndoWrist repair and replacement, and that Intuitive has monopoly power in that aftermarket, are in direct conflict with the Ninth Circuit’s controlling decision in *Epic Games*, 67 F.4th 946 (9th Cir. 2023). Accordingly, reconsideration is warranted either because the Court did not “consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order,” Civ. L.R. 7-9(b)(3), or to “prevent clear error or prevent manifest injustice.” *Gray v. Golden Gate National Recreational Area*, 866 F. Supp. 2d 1129, 1132 (N.D. Cal. 2011). In the alternative, Intuitive asks that the Court certify the rulings at issue for interlocutory appeal under 28 U.S.C. § 1292(b).

In *Epic Games*, the Ninth Circuit set out four requirements that “a plaintiff must show” “to establish a single-brand aftermarket.” 67 F.4th at 977. The Court held:

In sum, to establish a single-brand aftermarket, a plaintiff must show: (1) the challenged aftermarket restrictions are ‘not generally known’ when consumers make their foremarket purchase; (2) ‘significant’ information costs prevent accurate life-cycle pricing; (3) ‘significant’ monetary or non-monetary switching costs exist; and (4) general market-definition principles regarding cross-elasticity of demand do not undermine the proposed single-brand market.

67 F.4th at 977.

Plaintiffs here do not purport to satisfy those requirements. Dkt. 194, Ex. A. Instead, they have argued only that the *Epic Games* requirements for defining a single-brand aftermarket do not apply in one limited circumstance: where the plaintiff has established that the defendant has monopoly power in the relevant primary market or “foremarket.” *Id.* at 2:1-7. Intuitive does not agree that a showing of monopoly power in the alleged foremarket is sufficient

1 to define a single-brand aftermarket under *Epic Games*. But, in any event, Plaintiffs have not  
2 made that showing here.

3 In its Order, the Court correctly found that there are genuine issues of material  
4 fact precluding summary judgment on the question of whether the relevant primary market is  
5 limited to surgical robots and whether Intuitive has market power or monopoly power in the  
6 primary market. Order at 15:22-27. Having reached that correct conclusion, and *denied*  
7 summary judgment for Plaintiffs with regard to their alleged foremarket, there was no legal or  
8 factual basis for the Court to *grant* summary judgment for Plaintiffs with regard to their alleged  
9 single-brand aftermarket. Plaintiffs have failed to establish, as a matter of undisputed fact, the  
10 requirements set out in *Epic Games* to establish a separate, single-brand aftermarket. And  
11 Plaintiffs also have failed to establish, as a matter of undisputed fact, that Intuitive has monopoly  
12 power in a properly defined foremarket. As a result, summary judgment should have been  
13 denied, *even under Plaintiffs' own view of the law*.

14 While the procedural history and background on these issues is set out in more  
15 detail in Exhibit A, in summary, the dispositive legal issue was presented to the Court as follows:

16 The Ninth Circuit decided *Epic Games* on April 24, 2023, eleven days after  
17 Intuitive had filed its opposition to Plaintiffs' motion for summary judgment, Dkt. 153. As noted  
18 above, *Epic Games* sets out four factors that plaintiffs "must show" where, as here, they seek to  
19 define a single-brand aftermarket. 67 F.4th 946 at 977. Those factors include, *inter alia*, that  
20 "the challenged aftermarket restrictions are 'not generally known' when consumers make their  
21 foremarket purchase." *Id.*

22 Plaintiffs did not address this holding of *Epic Games* in their May 4, 2023 reply in  
23 support of partial summary judgment. *Cf.* Dkt. 169 at 16 (citing *Epic Games* for a different,  
24 unrelated proposition). In Intuitive's May 25, 2023 reply on its cross-motion for summary  
25 judgment—the first brief on summary judgment that Intuitive filed after *Epic Games* was  
26 decided—Intuitive relied on *Epic Games* to argue that "an 'aftermarket' exists as a *separate*  
27 relevant market only if, *inter alia*, the customer's obligation to purchase aftermarket items from  
28 the same seller is not disclosed at the time of the original purchase." Dkt. 188 at 15. Intuitive

1 further argued that “plaintiffs cannot make this showing” because Intuitive’s contracts disclose  
 2 the purchaser’s obligation to buy EndoWrists from Intuitive. *Id.*

3 Plaintiffs then moved for leave to file a sur-reply specifically to respond to  
 4 Intuitive’s arguments under *Epic Games*. Dkt. 194.<sup>2</sup> Plaintiffs did not argue that they could  
 5 satisfy the four factors that *Epic Games* had identified as required “to establish a single-brand  
 6 aftermarket.” 67 F.4th at 977. Instead, Plaintiffs made two arguments, one procedural and one  
 7 substantive, about why the Court should ignore the holding of *Epic Games*. Procedurally, they  
 8 argued that Intuitive “had every opportunity to make this specious argument in its opposition  
 9 brief” to Plaintiffs’ motion—even though *Epic Games* had not yet been decided when Intuitive  
 10 filed its opposition—“but failed to do so.” Dkt. 194 at 3:9-10 & n.4. Substantively, Plaintiffs  
 11 argued (in their proposed sur-reply) that “the requirements of the lock-in theory” set forth in *Epic*  
 12 *Games* “do not apply” because “Intuitive possesses monopoly power in a cognizable primary  
 13 market: the market for minimally invasive surgical robots (‘Robots’).” Dkt. 194, Ex. A at 2:28-  
 14 3:1; *see id.* at 4:1-2 (“Because the evidence unambiguously shows that Intuitive has monopoly  
 15 power in the Robots market, the requirements of the lock-in theory do not apply.”)

16 The parties thus disagreed about the meaning and significance of *Epic Games*  
 17 only to the following limited extent: To define a separate, single-brand aftermarket for  
 18 EndoWrist repair and replacement, Intuitive contended (and contends) that Plaintiffs are required  
 19 to satisfy the four-factor *Epic Games* test. For their part, Plaintiffs argued that they did not have  
 20 to satisfy the *Epic Games* test, *if* they could establish that Intuitive has monopoly power in a  
 21 cognizable primary market for surgical robots.

22 But this disagreement is neither here nor there with regard to whether leave to  
 23 seek reconsideration should be granted, as the outcome on the aftermarket issue should have  
 24 been the same either way, given the Court’s ruling on the primary market question.<sup>3</sup> Plaintiffs  
 25

26 <sup>2</sup> The Court denied Plaintiffs’ motion for leave to file this sur-reply. Order at 32:16-18. Intuitive  
 27 discusses it here (and in Exhibit A at 5:16-6:20), to confirm the arguments Plaintiffs made (and  
 did not make) regarding the applicability of *Epic Games* to this case.

28 <sup>3</sup> Plaintiffs’ prior argument that Intuitive should have presented the *Epic Games* issue to the  
 Court sooner, or in a different form, *see* Dkt. 194, is likewise irrelevant to the question of  
 reconsideration. Though Intuitive disagrees with Plaintiffs’ argument, the relevant timing

1 never contended that they had satisfied, nor could they satisfy, the four-factor *Epic Games* test as  
 2 a matter of undisputed fact. *See* Dkt. 194, Ex. A. And Plaintiffs never argued, nor would there  
 3 be any factual or legal basis for them to argue, that they could be entitled to summary judgment  
 4 on a separate, single-brand aftermarket if the Court denied their motion for summary judgment  
 5 as to the alleged primary market—as the Court has now done. *See id.* Rather, Plaintiffs’  
 6 argument that they could establish the existence of separate products, define a single-brand  
 7 aftermarket, and show that Intuitive had monopoly power in that aftermarket—without satisfying  
 8 the four *Epic Games* factors—was explicitly premised on the idea that they could first establish,  
 9 as a matter of undisputed fact, “that Intuitive possesses monopoly power in a cognizable primary  
 10 market” for surgical robots. *Id.* at 2:27-3:1.

11 In this context, reconsideration is plainly warranted. In its Order, the Court found  
 12 that “there exists a genuine dispute as to whether surgical robots constitute a distinct market that  
 13 can be separated from laparoscopy and open surgery.” Order at 16:2-3. Accordingly, the Court  
 14 denied the Plaintiffs’ motion for summary judgment with respect to the definition of an alleged  
 15 primary market for surgical robots and as to Intuitive’s market power or monopoly power in such  
 16 a market. *Id.* at 14:12-16:4. Yet, despite that ruling, the Court granted summary judgment to  
 17 Plaintiffs on the issues of a separate, single-brand aftermarket for EndoWrist repair and  
 18 replacement and Intuitive’s monopoly power in that alleged single-brand aftermarket. *Id.* at  
 19 14:3-11, 18:9-11, 21:3-5.

20 As explained above, and discussed in more detail in the attached Exhibit A, we  
 21 respectfully submit that the Court’s rulings granting summary judgment to Plaintiffs in these  
 22 circumstances are clearly erroneous, and cannot be squared with the Ninth Circuit’s decision in  
 23 *Epic Games*—under *either* Plaintiffs’ *or* Defendants’ interpretation of that decision.  
 24 Accordingly, these rulings should be reconsidered.

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 27 \_\_\_\_\_  
 28 question under Local Rule 7-9(b)(3) is whether the Court failed “to consider material facts or  
 dispositive legal arguments which were presented to the Court *before such interlocutory order.*”  
 Civ. L.R. 7-9(b)(3) (emphasis added). That requirement is met here, as discussed *supra* and in  
 Exhibit A at 3:20-7:18.

1 If, however, the Court denies leave to seek reconsideration or declines to  
 2 reconsider these rulings, then we respectfully submit that the Court should certify an  
 3 interlocutory appeal to the Ninth Circuit. We are aware of no case, from within the Ninth Circuit  
 4 or elsewhere, holding that a plaintiff can establish a separate, single-brand aftermarket where it  
 5 has neither met the requirements set forth in *Epic Games*, nor established that the defendant has  
 6 monopoly power in a properly defined foremarket. As discussed further in Exhibit A at 13:3-13,  
 7 this is clearly a “controlling question of law.” 28 U.S.C. § 1292(b). Intuitive respectfully  
 8 submits that Ninth Circuit law on this issue is clear, especially given the Ninth Circuit’s  
 9 explanation in *Epic Games* of what a plaintiff “must show” in order “to establish a single-brand  
 10 aftermarket.” 67 F.4th at 977. If the Court disagrees with the arguments Intuitive has presented  
 11 for reconsideration, however, that would necessarily mean that there is a “substantial ground for  
 12 difference of opinion,” 28 U.S.C. § 1292(b), on these issues, because the Court’s ruling would  
 13 diverge from *Epic Games* and other established precedent, under *either* Plaintiffs’ *or*  
 14 Defendants’ interpretation.<sup>4</sup> Further, in this scenario it would “materially advance the ultimate  
 15 termination of the litigation,” *id.*, for the Ninth Circuit to decide these important legal issues  
 16 immediately, and before the Court, the parties, and potentially a group of jurors expend the  
 17 considerable resources needed to see this case through to final judgment.

### 18 CONCLUSION

19 For the foregoing reasons, Intuitive respectfully requests that the Court grant  
 20 leave to file the motion for reconsideration attached hereto as Exhibit A, and that the Court  
 21 reconsider its rulings granting summary judgment to Plaintiffs for the reasons set forth in that  
 22 motion. In the alternative, Intuitive respectfully requests that the Court certify these rulings for  
 23 an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

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<sup>4</sup> See also Exhibit A at 13:14-14:9.

1 Dated: April 30, 2024

By: /s/ Kenneth A. Gallo  
Kenneth A. Gallo

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